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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## Nos. 467 MISC.

4278 HAZEL BUILDING CORPORATION, a CORPORATION, L. L. VANDERVOORT, AND HAZEL-CREST HOTEL CORPORATION, A CORPORATION,

*Petitioners,*

*vs.*

ALBERT BEREST, KATHERINE M. BOGDAN, MAUD A. SULLIVAN, NITTA BEALES, J. W. DOWNS AND B. McTAGGART, FLORENCE B. ANDREWS, RUTH A. JUBB, FLORENCE M. RADCLIFFE, DR. EDWARD SAGER, KATHERINE E. STIMSON, KENNETH ANDERSON, R. M. SCALLON, EUGENIA T. AND FRANCES SCHIERSTEIN, SIMON S. FROLICH, EDWARD KRAUSS, JOSEPH G. BEZARK, MAX SINZHEIMER, ROSELLA PEARSON, OLIVE MARSHALL, DAVID J. DAVIS, E. J. RYAN, L. J. CALDWELL, JOHN VAUDREUIL, MINERVA L. HERRMANN AND LORETTA L. HERMANN,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND BRIEF IN SUPPORT THEREOF.**

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable Chief Justice and Associate Justices of the United States:*

Petitioners, 4278 Hazel Building Corporation and Hazel-Crest Hotel Corporation, petition this Court for the issuance of a Writ of Certiorari to the United States District

Court for the Northern District of Illinois, Eastern Division, to review its order overruling the petitioners' motion to dismiss the action for want of jurisdiction, to the end that its order be reversed with directions to dismiss the proceeding for lack of jurisdiction.

## SUMMARY OF THE MATTER INVOLVED.

Twenty-three tenants joined in one complaint consisting of twenty-three separate counts for treble damages against petitioners under Section 205 of the Housing and Rent Act of 1947 (50 U. S. C. A. App. § 1895). None of the plaintiffs in each of the counts have the required jurisdictional amout of $3,000.00. Subsequent to the filing of the complaint, the Court permitted three additional plaintiffs to join by two separate counts, over the objection of the petitioners. The motion to dismiss the action for lack of jurisdiction was on the ground: (1) that none of the plaintiffs possessed the jurisdictional amount of $3,000 and that their claims may not be aggregated for the jurisdictional amount; and (2) that it was improper to join the 23 separate actions under one complaint, and to later join additional parties with distinct causes of action, and that such a suit may not be filed in the absence of the jurisdictional amount. Petitioners relied on the decision in *Field* v. *Washington,* 173 F. (2), 701, in support of their motion to dismiss. Before the Court ruled on the motion, the Court of Appeals for the 7th Circuit reached the opposite conclusion, disagreeing with the decision in the *Field* case, and held that jurisdiction existed, regardless of the amount. (*Adler* v. *Northern Hotel Co.,* 175 F. (2) 619). The District Court was bound by the decision of the Court of Appeals for the same Circuit and over-

ruled the motion to dismiss, and at the same time allowed the filing of the supplement to the Complaint by adding additional plaintiffs with two additional separate counts.

The principal stockholders of two corporations, petitioners herein, are also owners of two other hotels where similar suits were instituted by twenty-eight tenants (*Henderson* v. *Belmar Building Corp.*) involving the identical issues, and the District Court likewise overruled the motions to dismiss. There are pending many other suits involving the identical questions, and it would be necessary in each of the cases to proceed with the trial, thereafter appeal to the court which had already decided the jurisdictional question in the affirmative, and thereafter apply for a review here on certiorari because of the conflict in the decisions. This would not only throw a great hardship on the parties, but also on the courts, which would be required to go through with trials and useless appeals in order to obtain a review in this court on the jurisdictional question.*

In addition to the decision in the *Fields* case, *supra,* the Third Circuit also rendered another decision, which held that jurisdiction was lacking (*Koster* v. *Turchi,* 173 F. (2) 608). The Court of Appeals for the Fifth Circuit is evidently in accord with the Third Circuit, that a $3,000 jurisdictional amount is necessary to confer jurisdiction (*Steinfield* v. *Haynman,* 175 F. (2) 768). The District Court of Kentucky which had before it the views of the Third Circuit and the views of the Seventh Circuit adopted the views of the former and dismissed the action for want of jurisdiction (*Hershenrader* v. *Campbell,* 85 F. Supp. 75). Some of the district courts are following the lead of the Third

* Before realizing that we could petition for the Writ directly to the District Court under § 1651, we went through the formality of abiding by the motion to dismiss in another case, suffered a judgment to be entered, filed the record in the Court of Appeals, and filed simultaneously with this Petition, a Petition for a Writ to the Court of Appeals.

Circuit and others are following the lead of the Seventh Circuit, and there is a great deal of confusion as a result of these conflicting decisions.

The Federal Courts are clogged with cases of this type, and if the jurisdictional amount is indispensable, then they should be relieved of the burden, and the parties should not be compelled to go through expensive trials for the purpose of getting a final judgment and then prosecute an appeal to a Court of Appeals which has already determined that issue in conflict with the decisions of two other circuits, and this court should grant the writ to avoid great hardship.

## QUESTIONS INVOLVED.

1. Whether under the Housing and Rent Act of 1947, the jurisdictional amount of $3,000 as required under Section 1331 (T 28, U. S. C. A. § 1331) is indispensable in order to confer jurisdiction on the district courts of a suit for treble damages under Section 205 of the Housing and Rent Act of 1947.

2. Whether twenty-five tenants with twenty-five distinct causes of action, whose separate claims are alleged in twenty-five separate counts, may unite in one suit on the theory under Rule 20 of the Federal Rules of Civil Procedure when none of the claims originated from the same transaction or a series of transactions.

3. Whether this court has the power to issue the writ to the district court before the entry of a final judgment and without prosecuting an appeal to the Court of Appeals.

## REASONS FOR THE ALLOWANCE OF THE WRIT.

1. There is a conflict in the decisions of the United States Courts of Appeal on the question whether the jurisdictional amount required under section 1331 of the Judiciary Act of 1948 (T 28 U. S. C. A. § 1331) is indispensable under the Housing and Rent Act of 1947. The district courts in the Third Circuit are compelled to follow the decision of their Court of Appeals and are dismissing the actions for want of jurisdiction. The district courts in the Seventh Circuit are compelled to follow the decisions of their circuit and sustain the jurisdiction. The district courts of the other circuits follow one or the other decisions, and there is a great deal of confusion as a result of such conflicting decisions. The writ should be issued to harmonize the decisions on this important federal question.

2. The same reason which prompted this court to allow writs to the District Courts to review an identical order in *United States Alkali Association* v. *U. S.*, 325 U. S. 196, and in *De Beers Mines* v. *U. S.*, 325 U. S. 212, is applicable here. The hardship in the instant case and in the many cases which are pending in the district courts, are not any less than in the two cases in which the writs were issued. If the jurisdiction is lacking, all the pending actions which now clog the Federal Courts, should be disposed of, and the parties should be relegated to courts of competent jurisdiction in the various States. The litigants would not be compelled to go through expensive trials and to uselessly appeal on the jurisdictional question to a court of appeals which had already decided the issue in conflict with other decisions, for the purpose of obtaining a review by this court.

3. Section 1254(1) (T. 28 U. S. C. A. § 1254) expressly authorizes the granting of a writ of certiorari before judgment, and section 1651(a) (T. 28 U. S. C. A. § 1651) authorizes the issuance of the writ to the District Court under the construction of prior § 262 of the Judicial Code, and the issuance of the writ at any time before judgment is expressly authorized by § 2101 (T. 28 U. S. C. A. § 2101(a)). The above sections in the new Judiciary Act were designed to liberalize the issuance of the writ and to remove any doubt. The writ should be issued under the exceptional circumstances as set forth above.

## PRAYER FOR RELIEF.

Petitioners, therefore, pray that this court may grant a Writ of Certiorari to the United States District Court for the Northern District of Illinois, Eastern Division, to the end that its order overruling the motion to dismiss be reversed, with directions to dismiss the action for want of jurisdiction.

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## BRIEF IN SUPPORT OF PETITION.

### Jurisdiction Invoked.

The jurisdiction of this court is invoked under Sections 1254, 1651 and 2101 of the Judiciary Act of 1948 (T. 28 U. S. C. A. §§ 1254, 1651 and 2101).* The right to issue the writ to the District Court is based on § 1651, which is identical with former § 262, under which this court held that it may issue the writ to the District Court prior to judgment when it overruled a motion to dismiss on jurisdictional grounds, where the case involves unusual hardships (*United Alkali Export Association* v. *U. S.*, 325 U. S. 196; *De Beers Mines* v. *U. S.*, 325 U. S. 212, 217).

## OPINION BELOW.

No opinion below was filed by the District Court, but in a memorandum which it furnished the attorneys, and which it did not make a part of the record, the court stated

* § 1254 of the Judiciary Act of 1948 provides:
"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."
§ 1651 of the Judiciary Act of 1948 provides:
"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."
§ 2101 of the Judiciary Act of 1948 provides:
"(d) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

that the decision of the Court of Appeals for this circuit that $3,000 was not necessary to confer jurisdiction, was binding upon it, and that under Rule 20, the joinder of the distinct causes of action was permissible.

## A STATEMENT OF THE CASE.

A complaint at law and at equity was filed on September 3, 1948 in the District Court for the Northern District of Illinois, seeking treble damages under the Housing and Rent Act of 1947. The complaint consists of twenty-three counts, and each count has a separate plaintiff and a distinct cause of action (Tr. 3-15).

The first count alleged (Tr. 3) that the petitioners received and accepted as rent from respondent, Albert Berest, $92.00 per month from October 1, 1947 to June 19, 1948, and $150.00 per month from June 19, 1948 to September 19, 1948, for apartment 202 in the building owned by the petitioners, while maximum rent during said period was $80.00 per month. He sued for treble damages in the amount of $936.00 (Tr. 3). Each count thereafter (Tr. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15) was identical, except that the plaintiff, the apartment, and the amount were different, and no single count had the jurisdictional amount of $3,000. Thereafter, the court allowed the filing of counts 24 and 25, and three additional plaintiffs were added by a supplement to the complaint (Tr. 24, 25). The controversy between the parties was whether or not the apartment hotel was decontrolled (Tr. 19).

Petitioners have filed three defenses: (1) That the court was without jurisdiction of the subject matter because of the absence of the requisite jurisdictional amount of

$3,000.00; (2) That the plaintiffs had no right to unite in one suit, as their actions did not originate from the same transaction or a series of transactions,* and (3) the merits on the ground that the apartment hotel was decontrolled (Tr. 20-21). On November 1, 1949, the district court overruled the two defenses, which were treated as a motion to dismiss, and allowed the filing of the supplemental complaint, joining the additional plaintiffs (Tr. 25).

* Rule 20 of the Federal Rules of Civil Procedure provides:
"(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

## ARGUMENT.

### I.

**There is a Conflict in the Decisions of the United States Courts of Appeal on the Question Whether the Jurisdictional Amount is Necessary to Confer Jurisdiction Under the Housing and Rent Act of 1947, and the Writ Should Issue to Harmonize the Decisions on This Important Federal Question.**

The United States Court of Appeals for the Third Circuit held in *Fields* v. *Washington,* 173 F. (2) 701, that the jurisdictional amount was *indispensable* under the Housing and Rent Act of 1947, and dismissed the proceedings for want of jurisdiction. The *opposite conclusion* was reached by the Court of Appeals for the Seventh Circuit with Mr. Justice Minton dissenting.

The majority opinion in *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619, said (p. 620):

> "Defendants call attention to the case of *Fields* v. *Washington,* 3 Cir., 173 F. 2d 701, and make the point that a federal court in order to be competent within the meaning of the Housing and Rent Act, *supra,* must find its jurisdiction under some provision of law existing at the time of the enactment of § 205 as part of the Act; they claim that the Act contains no general grant of jurisdiction, and argue that § 205 means any federal court authorized by a pre-existing jurisdictional grant to hear and determine a particular case, requiring as one of its conditions an amount in controversy in excess of $3,000. It does not appear that the court in *Fields* v. *Washington, supra,* considered § 205(e) of the Emergency Price Control Act, or that it was called to its attention."

In the minority opinion written by Mr. Justice Minton, he said (p. 623):

> "The majority opinion states that when Sec. 205 (c) and (e) of the original Act are read together, 'they produce language in effect identical with § 205 of the Housing and Rent Act.' (The latter the 1947 Act here under consideration.) That the District Court was a court of competent jurisdiction under the original Act, regardless of amount, is because Congress clearly said so when in subsection 205 (c) it gave the District Courts jurisdiction in all controversies under Sec. 205. To repeat, it reads as follows: 'The district courts shall have jurisdiction • • • concurrently with State and Territorial courts, of *all* other proceedings under section 205 of this Act.' This and Sec. 205 (e) are the provisions of the original Act which the majority says we must consider in determining what the 1947 Act means, and on the basis of which it concluded that the two mean just the same thing."

He further said (p. 624):

> "The words '*competent jurisdiction*' were used advisedly. Otherwise, the jurisdiction of this Court and of other Federal courts might have been mooted. Congress dealt with jurisdiction in the 1947 Act in a completely different way than the manner in which it dealt therewith in the original Act. Then too, Congress might very properly have intended to keep the District Courts within their traditional bounds and to relieve them from acting as justice of peace courts.
>
> "The exact question here presented was decided just oppositely by the Third Circuit in an opinion by Judge Maris, Chief Judge of the United States Emergency Court of Appeals, in *Fields* v. *Washington*, 173 F. 2d. 701. I cannot dispose of this carefully reasoned opinion as cavalierly as the majority. I think that Judge Maris, an expert on this type of law, was fully cognizant of Sec. 205 (e) and all the other sections of the original Act as well as of the 1947 Act."

In *Steinfeldt* v. *Haymond,* 175 F. 2d. 768, the Court of Appeals for the Fifth Circuit said (p. 769):

> "Brought by a tenant against his landlord, the suit was for $2100.00 treble damages for rent overcharges of $700.00 claimed to have been exacted between January 1, 1946, and January 6, 1947. Though, therefore, the suit was brought after enactment of the Housing and Rental Act of 1947, the limited jurisdictional provisions of Section 205 of that act, Cf. *Fields* v. *Washington,* [illegible] F. 2d 701, did not apply, and the suit was properly brought under the saving provisions of Sec. 901 (b), 50 U. S. C. A. Appendix."

As a result of these conflicting decisions the District Courts are also not in accord.

In *Hershenrader* v. *Campbell,* 85 F. Supp. 75, the court said (p. 75):

> "In *Fields* v. *Washington,* 3 Cir., 173 F. 2d. 701, 702, a tenant sued the landlord for $672.00 (treble the amount of the alleged overcharge), Attorney's fees and costs, under the 1947 Housing and Rent Act, as amended. The Court dismissed the action for lack of pecuniary jurisdiction. Upon authority of that case and in the light of the reasoning in that opinion, it is obvious that this Court is without jurisdiction in the present case."

It also said:

> "The jurisdiction given in Section 925(c) of Title 50 U. S. C. A. Appendix to District Courts, 'concurrently with State and Territorial courts, of all • • • proceedings under section 205' of the Emergency Price Control Act of 1942 was materially changed in the enactment of the 1947 Housing and Rent Act. In the latter, the jurisdictional grant reads, 50 U. S. C. A. Appendix, § 1895: 'Suit to recover such amount may be brought in any Federal, State, or territorial Court of competent jurisdiction • • •' 'It follows' says the opinion in *Fields* v. *Washington, supra,* 'that the competency of a Federal district court to entertain such

a suit by a tenant must be based upon some other statutory grant of jurisdiction over the subject matter and the parties."

In discussing the *opposite decision* of the Seventh Circuit the court said (p. 75):

> "An opposite conclusion to that reached in *Fields* v. *Washington* is determined by the Court of Appeals of the Seventh Circuit in *Adler* v. *Northern Hotel Company,* 1949, 175 F. 2d 619."

In holding that the reason in the *Fields* case was sound, the court said (p. 75):

> "The clear-cut analysis by the Court in *Fields* v. *Washington* of the jurisdictional grants in the Emergency Price Control Act of 1942 and in the Housing and Rent Act of 1947, indicates that Congress intended to *limit* the jurisdiction of District Federal Courts just as the language used indicates it has done. This Court is without jurisdiction, and this action will be dismissed, without prejudice, however, to plaintiff's right to institute an action in a Court of 'competent jurisdiction.'"

The confusion in the decisions of the District Courts is apparent. The District Courts of the Third and Fifth Circuit are compelled to follow the decisions of their respective circuits, and they are dismissing the suits for want of jurisdiction, while the district courts in the Seventh Circuit are bound by the decision of the Seventh Circuit and are sustaining the jurisdiction. Among the district courts which held that the jurisdictional amount was not required are the decisions in *Sampson* v. *Thomas,* 76 F. Supp. 691; *Adams* v. *Backlund,* 81 F. Supp. 643; *United States* v. *Resch,* 84 F. Supp. 389, 392. As against these, the district courts in the following decisions have held the jurisdictional amount was indispensable: *Fox* v. *34 Hillside Realty Corp.,* 79 F. Supp. 832; *Luftman* v. *Ross,* 75 F.

Supp. 627; *Spieler* v. *Haas*, 79 F. Supp. 835; *McCrae* v. *Johnson*, 84 F. Supp. 220.

The writ should, therefore, issue to harmonize the decisions on this important jurisdictional question.

## II.

**The Writ of Certiorari May Issue to the District Court to Review Its Interlocutory Order Overruling a Motion to Dismiss for Lack of Jurisdiction, and the Writ Will Issue in Exceptional Cases Under the Circumstances Involved in This Case.**

The question whether this court may issue its writ of certiorari to the District Courts to review an interlocutory order overruling a motion to dismiss an action for want of jurisdiction, was clearly decided by this court in two decisions under § 262 of the former judiciary act. Section 1651 of the Judiciary Act of 1948 (T. 28 U. S. C. A. § 1651) takes the place of former § 262.

The identical question was presented to this court in *United States Alkali Export Association* v. *United States*, 325 U. S. 196. There, the District Court, as here, *overruled the motion to dismiss the complaint based on jurisdictional grounds.* The question was whether this court had the power to issue the writ and whether the writ should be issued. This court held (p. 201) that it had the power to issue the writ and that the *only* question was whether it should use its discretionary power to issue the writ. In deciding in favor of the issuance of the writ, this court pointed out that there were *exceptional circumstances* under which the writ would issue. There, the court said (p. 204):

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission,

together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. *The case is analogous to those in which this Court has, by writs issued under Section 262, reviewed the action of district courts, alleged to be in excess of their authority,* by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal, see *In re Chetwood, supra*; *McClellen* v. *Carland, supra, Ex parte Metropolitan Water Co.,* 220 U. S. 539 *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, *Maryland* v. *Soper,* (No. 1) 270 U. S. 9, *Ex parte Northern Pacific R. Co.,* 280 U. S. 143; *Colorado* v. *Symes,* 286 U. S. 510; or by which they have deprived a party of a trial by jury. *Ex parte Simons,* 247 U. S. 231; *Ex parte Peterson,* 253 U. S. 300, 305."

This case was cited with approval in *De Beers Mines* v. *United States,* 325 U. S. 212, 217.

Under the new Judiciary Act it is provided (T. 28, U. S. C. A. § 1254 (1)) that this court may issue the writ "before or after rendition of judgment or decree" and it further provided (T. 28, U. S. C. A. § 2101 (d)) that "an application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the Court of Appeals may be made at *any* time before judgment."

It would not only be a great hardship to Petitioners to compel them to proceed with the trial in the District Court and later appeal to the Court of Appeals which has already decided this issue in favor of the jurisdiction and thereafter apply for the Writ of Certiorari to this Court on the jurisdictional question, but it would place an unnecessary burden on the district courts.

There are many similar suits pending in the District Court involving the identical question. In the *Adler* case,

*supra,* after the Court of Appeals ruled in favor of the jurisdiction, it reversed the case on the merits (..... F. (2) .....) and it will be necessary now to retry the case, and in the event of a judgment against the defendants, it will require another appeal which may lead to a review on the jurisdictional question, and if this court should finally hold that there was an absence of jurisdiction, the entire proceedings could have been avoided. For these reasons the discretionary writ should be issued by this court.

## III.

**Several Plaintiffs May Not Unite in One Suit Against Several Defendants for Distinct Causes of Action Which Did Not Originate From the Same Transaction or Series of Transactions.**

In *Hooper & Co.* v. *Samuel M. Langstrom,* 56 F. Supp. 577, the Court considered Rules 20-21 and 57 of the Federal Rules of Civil Procedure in a case involving the *joinder of distinct causes of action by several plaintiffs.* A motion to dismiss the complaint on the ground of misjoinder was made by Samuel M. Langstrom, one of the defendants. After citing from the rule that all persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally or in the alternative in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, or if any question of law or fact common to all of them will arise in the action, and after pointing out that under the Federal rules of misjoinder of parties misjoinder does not give ground for dismissal of an action, the Court pointed out that there was not only a misjoinder of parties, but *a misjoinder of causes of action,* and that where a misjoinder of causes of action occurs, *the complaint must be*

*dismissed as to the cause which is misjoined.* At page 581, the court said:

> "The right to relief asserted under each patent does not arise under the same transaction and there is no common question of law or fact as to both defendants that might arise. Upon evidence submitted, there is no basis upon which these two causes can be joined under Rule 20 (A) *supra,* and they must, therefore, be severed, Rule 21 *supra.*"

The Court thereafter sustained the motion to dismiss.

In an opinion rendered by Judge LaBuy in *Colburn* v. *Birr,* 4 F. R. D. 391, he said:

> "Rule 20 cannot be applied for that rule pertains to the 'same transaction, occurrence or series of transactions or occurrences.' If the plaintiff had included the Martin and Grundwald patents in his original complaint, it would have been a misjoinder of causes. *Hooper* v. *Langstrom,* D. C., 56 F. Supp. 577."

The rule that there can be no joinder of distinct causes of action by several plaintiffs which did not arise out of the same transaction or series of transactions was also adopted in *Fleming* v. *Whitemore,* 41 F. Supp. 767, 768.

In *Carl Gutmann & Co.* v. *Rohrer Knitting Mills,* 86 F. Supp. 506, the court said (p. 511):

> "This is not a case where plaintiff alleges a single cause of action but is uncertain as to which of two or more defendants may be liable. Here, while arising out of the same transaction, occurrence, or series of transactions or occurrences, the gravamen of the complaint is not the doing or failing to do a single act by one or more persons, but rather the doing of entirely separate and distinct acts, in the one instance by one corporation and in the other instance by another corporation and four individuals. This is not the alternative situation contemplated by the Rule."

The rule that distinct causes of action may not be joined

in one suit by several plaintiffs was also adopted by the Illinois courts in construing the identical rule under the civil practice act of Illinois (*Gombi* v. *Taylor Washing Machine Co.*, 290 Ill. App. 53, 62).

In applying the law to the Rent Control Act and in holding that persons who lack the jurisdictional amount may not unite to commence an action under the Rent Control Act, in *Fox et al.* v. *34 Hillside Realty Corporation*, 79 F. Supp. 832, the Court says:

> "Plaintiffs urge that jurisdiction is conferred on this court by the Housing and Rent Act of 1947, as amended, 50 U. S. C. A. Appendix § 1881 *et seq.* and by the Declaratory Judgment Act, 28 U. S. C. A. §§ 2201, 2202; that this is an action to enforce a penalty brought under 28 U. S. C. A. § 1355 and that the matter in controversy exceeds the sum of $3,000 exclusive of interests and costs and arises under the Constitution or law of the United States."

In holding that the Court was without jurisdiction of the subject matter, it was said:

> "Plaintiffs may not aggregate their claims. When the demands of the numerous plaintiffs are separate and distinct, each must have a claim in the jurisdictional amount; only when plaintiffs unite to enforce a joint or common interest is aggregation permissible. *Pinel* v. *Pinel*, 240 U. S. 594, 36 S. Ct. 416, 60 L. Ed. 817. In *Luftman* v. *Ross*, S. D. N. Y., 1948, 75 F. Supp. 627, 628, Judge Rifkind wrote:
>
> > 'The contention that the threatened rent increases of all the plaintiffs may be aggregated is ill founded. The plaintiffs in this action clearly assert several rights.'
>
> See also *Hock* v. *250 Northern Ave. Corporation*, 2 Cir., 142 F. 2d 435; *Spieler* v. *Haas*, 79 F. Supp. 835."

We have shown above that there is a conflict between the several Courts of Appeal and the District Courts on the jurisdictional question, and that the right to join the

several causes of action which did not originate from the same transactions or a series of transactions is also a debatable question. Therefore, the writ should be issued.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## No. 467 Misc.

4278 HAZEL BUILDING CORPORATION, A CORPORATION, L. L. VANDERVOORT, AND HAZEL-CREST HOTEL CORPORATION, A CORPORATION,

*Petitioners,*

*vs.*

ALBERT BEREST, KATHERINE M. BOGDAN, MAUD A. SULLIVAN, NITTA BEALES, J. W. DOWNS AND B. McTAGGART, FLORENCE B. ANDREWS, RUTH A. JUBB, FLORENCE M. RADCLIFFE, DR. EDWARD SAGER, KATHERINE E. STIMSON, KENNETH ANDERSON, R. M. SCALLON, EUGENIA T. AND FRANCES SCHIERSTEIN, SIMON S. FROLICH, EDWARD KRAUSS, JOSEPH G. BEZARK, MAX SINZHEIMER, ROSELLA PEARSON, OLIVE MARSHALL, DAVID J. DAVIS, E. J. RYAN, L. J. CALDWELL, JOHN VAUDREUIL, MINERVA L. HERRMANN AND LORETTA L. HERMANN,

*Respondents.*

## REPLY BRIEF OF PETITIONERS.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 1651 OF THE JUDICIARY ACT AND TO CONSOLIDATE THIS CAUSE WITH CASE NO. 742.

MEYER ABRAMS,
WILLIAM HENNING RUBIN,
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4278 HAZEL BUILDING CORPORATION, A CORPORATION, L. L. VANDERVOORT, AND HAZEL-CREST HOTEL CORPORATION, A CORPORATION,

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*Respondents.*

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## PETITIONERS' REPLY.

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### STATEMENT.

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We have filed simultaneously with the petition in the instant case, another petition for the issuance of a Writ of Certiorari before judgment to the Court of Appeals for the Seventh Circuit involving the *identical* issues (Case No. 742). The respondents in that case *conceded* in their answer the importance of the question, the conflict

in the decisions, and admitted that this was a proper case for the issuance of the discretionary Writ by this court. The only difference between this case and the other is that this petition is sought to be filed under § 1651 (28 U. S. C. A. § 1651) while the other petition was filed under §§ 1254 and 2101 (28 U. S. C. A. §§ 1254 and 2101). If this court will grant the Writ in case No. 742, we suggest that upon the allowance of the motion for leave to file this petition, that the two cases be consolidated for hearing.

Respondents *concede* (p. 4) that this court has the jurisdiction and "power" to issue the Writ and that (p. 15) "There exists a conflict in the decisions between the Seventh and Third Circuits as to the construction of § 205 of the Housing and Rent Act". They only oppose the granting of the writ at this stage, and insist that we must go through the *formality* of trial, an appeal, and then apply here for the Writ. They contend that the fact that the Seventh Circuit decided that question in another appeal (*Adler* v. *Northern Hotel Co.*, 175 F. (2d) 619) does not follow that it may not change its ruling upon the prosecution of another appeal. They, themselves, *cite* on another point (p. 5) the decision of *Meyercheck* v. *Givens*, 180 F. (2) 221 where the Seventh Circuit *foreclosed* a reargument on the jurisdictional question when it referred to its previous decision in the *Adler* case in which there was a strong dissenting opinion by Mr. Justice Minton, and in referring to that dissenting opinion and in *adhering* to its views the court said (pp. 222-3):

> "while there may be room for argument as to the validity of our holding in that case, we are not convinced that it is erroneous and we adhere to it."

This was the *unanimous* opinion of the Seventh Circuit on the subsequent appeal in another case. This court, will, therefore, not require petitioners to go through the formality of useless acts as we have done in Case No. 742.

I.

**While the Impropriety of the Joinder of Parties and Causes May in Itself Not be Ground for the Issuance of the Extraordinary Writ Before Judgment, This Question May be Incidentally Decided Upon the Issuance of the Writ to Review the Jurisdictional Question Under the Extraordinary Circumstances.**

The contention that the Extraordinary Writ of Certiorari should not be invoked to determine the question of the propriety of the joinder of the parties and subject matter, is without merit, as the grounds for the issuance of the writ is the conflict in the decisions on the jurisdictional question, and if the extraordinary writ is issued the incidental question may be determined in the discretion of this court.

II.

**The Conflict in the Decisions of the Third, Fifth and Seventh Circuits and the Doubt Expressed by the Tenth Circuit, as Well as the Confusion Which Prevails in the Respective District Courts is Sufficient Reason for the Issuance of the Writ.**

Respondents urge four reasons for the denial of the writ, none of which are meritorious.

**1. The Interlocutory Order May Not Be Reviewed by the Circuit Court of Appeals.**

The contention (p. 7) that the interlocutory order may be reviewed by a writ of certiorari issued by the Court of Appeals under § 1651 is clearly without any basis. At any rate, an application to it to issue the *discretionary writ* would be *futile,* as the question was decided by it in

the first instance (*Adler* v. *Northern Hotel Co.*, 175 F. (2) 619), and it adhered to its former decision in a later appeal (*Meyercheck* v. *Givens*, 180 F. (2) 221). The argument (p. 8) that "there is no justification in this case for circumventing the Court of Appeals," and the statement that "petitioners may not assume that recourse to it will therefore be futile" is overcome by the opinion of that Court in *Meyercheck* v. *Givens, supra.*

**2. The Fact That the Trial Court's Ruling on the Motion Did Not Constitute an Extra-Judicial Act Is No Reason for the Denial of the Writ Under the Extraordinary Circumstances in This Case.**

It is true as counsel say (p. 9) that this court will not issue extraordinary writs as a substitute for appeal where the matters are reviewable in the "regular" course of appeal. Petitioners are in no position to appeal from the interlocutory order. If the Court of Appeals had left room for argument, Petitioners might be required to submit to trial and prosecute an appeal, and later seek a review here. The situation here is completely different. *The Court of Appeals has closed the door to review the jurisdictional question* in the two decisions cited above. Its views are in *conflict* with the views of the other Court of Appeals. This court will not require Petitioners to go through a tedious and costly trial in order to go through a *formality* to prosecute a useless appeal and to seek a review here.

Petitioners will be compelled to go through a lengthy trial with twenty-five plaintiffs on the question whether the Hotel was decontrolled. The question whether the Hotel is known in the community as a "hotel" and whether the Hotel furnished the required service to each of the twenty-five plaintiffs would consume a great deal of time and expense, and if it should be decided later that there was an absence of jurisdiction, the whole matter would

become wasted labor, expense and efforts. In the other case (175 F. (2) 619), the parties were compelled to go through a lengthy trial and to prosecute an appeal. After the determination of the jurisdictional question by the Court of Appeals, the case was remanded for a new trial (*Adler* v. *Northern Hotel Co.*, 180 F. (2) 742). The parties will now be compelled to go through another lengthy trial pursuant to the remanding order, and thereafter prosecute another appeal and later seek a review here on the jurisdictional question and should this court decide against the jurisdiction all the work and expense would be for naught. It is *to avoid such an unreasonable result and the great hardship upon the parties, as well as upon the courts* that this Petition is filed to obtain a decision from this court on the jurisdictional question on which the courts are not in accord.

In order to avoid the technicality that we did not file a Petition to review the case while pending in the Court of Appeals, we went through the formality in the other case (No. 742), stood by the motion to dismiss, suffered the entry of a default judgment, prosecuted an appeal to the court of appeals and then filed the Petition here pursuant to Sections 1254 and 2101 of the Judiciary Act of 1948. We did not do this futile act in the instant case, as we considered that if this court will grant the petition in the other case it will also grant the writ in this case which involves the identical questions.

### 3. The Issuance of the Writ Is Not Based on Irreparable Injuries But on Great Hardship and Unusual Circumstances.

No irreparable injury is relied on for the request of the issuance of the writ under § 1651 to which counsel devote their brief in opposition thereto (p. 10). The test for the issuance of the writ in the two cases where the writs were issued under former § 262 which is now replaced

by § 1651 (*United States Alkalai Exp. Ass.* v. *U. S.*, 325 U. S. 14; *De Beers Mines* v. *U. S.*, 325 U. S. 212) was *not* based on irreparable injury but on "hardship imposed" coupled with *unusual circumstances* concerning a jurisdictional question.

In the *Roche* case (319 U. S. 21) which counsel cite (p. 5) the writ was denied on the ground that "inconvenience" of trial was not contemplated by Congress when it allowed the review from "final" judgments only. The Judiciary Act of 1948 has *liberalized* review by certiorari and provided in the Act (T. 28, § 1254 (1)) that a review by certiorari is permissible *before* judgment. This was followed by another section of the act (T. 28, § 2101 (d)) which provides that where the review is sought from an interlocutory order *before* judgment, the writ may be issued regardless of the time when the order was entered. These two sections are to be read together with the section under which the instant petition is sought to be filed (T. 28, § 1651).

**4. The Question Is of Sufficient Public Importance to Be Decided by This Court.**

Respondents here claim that the question is not of sufficient public importance for the issuance of the writ. The *opposite view* was taken by the respondents in case No. 742.

The statement of counsel (p. 15) that "there has been no decisions" other than the *Field* and *Adler* cases is refuted by their *own citation* on another point of the decision in *Meyercheck* v. *Givens*, 180 F. (2) 221. The point was also discussed in a decision rendered by the 10th Circuit which mentioned the conflicting views but took no position in the matter as it distinguished that case from the other two cases (*Greiber* v. *Woods*, 177 F. (2) 1016, 1017).

The conflicting views of the 7th Circuit as expressed in *Adler* v. *Northern Hotel Co.*, 175 F. (2) 619, and *Meyercheck* v. *Givens*, 180 F. (2) 221, with the views of the 3rd Circuit in *Fields* v. *Washington*, 173 F. (2) 701; *Koster* v. *Turchi*, 173 F. (2) 608, followed by the 5th Circuit in *Steinfeld* v. *Hayman*, 175 F. (2) 68, and the confusion in the decisions of the various district courts as cited in our brief (pp. 13-14) and in the cases which came to our attention since the filing of the petition (*Morein* v. *Hausman*, 85 F. Supp. 57; *Ramseyer* v. *Constable*, 86 F. Supp. 104; *Frisch* v. *Lopez*, 87 F. Supp. 544), call for the exercise of the discretionary power of this court to allow the filing of this petition and to grant the writ.

## Conclusion.

In view of the foregoing, we suggest to the court that leave be granted to file the instant petition and to consolidate it with Case No. 742 and that the writ be issued so that the important Federal question on which the various courts are not in accord may be finally settled.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1949.

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4278 HAZEL BUILDING CORPORATION,
a corporation, et al.,
*Petitioners,*

*vs.*

ALBERT BEREST, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ALBERT BEREST, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Opinion Below.

This matter comes up on the District Court's denial of an interlocutory motion to dismiss for lack of jurisdiction and for misjoinder of parties. (Tr. 25). The Trial Court rendered no formal opinion, reported or otherwise.

### Jurisdiction.

The order of the District Court sought to be reviewed was entered on November 1, 1949. (Tr. 25). The petition for a writ of certiorari was filed in this Court on April 10, 1950. Petitioners seek to invoke the jurisdiction of this Court under Section 1651 of the Judiciary Act of 1948 (28 U.S.C.A. § 1651). Sections 1254 and 2101 of said Act, also relied upon by petitioners, are not involved herein.

**Question Involved.**

The question involved herein is whether this Court should issue a writ of certiorari directly to the District Court to review its denial of an interlocutory motion to dismiss by which it:

a. Determined that the parties were properly joined in this action; and

b. Construed section 205 of the Housing and Rent Act of 1947, (61 Stat. 193, 50 U.S.C. App. Supp. § 1881.) as permitting the bringing of tenants' damage suits for rent overcharges in the district court, regardless of the amount involved.

**Statement of the Case.**

The statement of the case made by petitioners is correct with the following modifications. This was an action for treble damages under Section 205 of the Housing and Rent Act of 1947 (61 Stat. 193; 50 U.S.C., App. Supp. § 1881) brought by 23 plaintiffs residing in one building. The Answer of the petitioners did not deny that the overcharges alleged in the complaint occurred if the premises were subject to the provisions of that Act. They alleged, however, that the building in which all of the plaintiffs resided was exempted under the provisions of that Act because it was a building commonly known as a hotel in the community, giving customary hotel services. (Tr. 19). The issues of fact and law, therefore, with respect to each of the plaintiffs, were identical and arose out of the same series of transactions. The Trial Court so ruled in the memorandum opinion referred to by petitioners. (Pet. 8).

Petitioners refer to another suit in which they, as defendants, raised the same motion to dismiss as herein, which was similarly denied. *Henderson et al.* v. *Belmar Building Corp. et al.*, D.C.N.D. Ill. No. 49 C 358. That

motion was denied on April 26, 1949. The conflict between the Seventh and Third Circuits has existed for a year. Yet, Petitioners did not seek certiorari from this Court alleging the necessity of emergency consideration of this issue until April 12, 1950.

## ARGUMENT.

The power of this Court to issue a writ of certiorari to a district court to review the denial of a motion to dismiss is not disputed. The sole question here is whether this case is a proper one for the exercise of that power. Respondents contend that it is not, for that extraordinary remedy has always been limited to extraordinary and emergency situations. Petitioners seek this writ solely for personal convenience in order to have piecemeal review of certain legal propositions without the burden of trial on the merits. If petitioners are correct, all rulings by district courts on interlocutory motions, where a contrary ruling would have avoided the necessity of a trial on the merits, would justify direct review by this Court.

### I.

### The propriety of the joinder of parties is not a proper subject for the extraordinary use of the writ of certiorari.

It is obvious that petitioners seek certiorari solely to avoid the personal inconvenience of the trial of this suit. They ask this Court to determine by the use of this extraordinary remedy whether the Trial Court in its discretion correctly permitted the joinder of parties. Respondents do not intend to consider fully at this time the merits of the question of joinder. Suffice it to say that the petitioners refer to no appellate cases in support of their position. Further, they refer to no cases under the Housing and Rent Act of 1947, (Pub. Law 129, 80th Cong., 1st Sess.), which preclude the joinder of plaintiffs,[1] particu-

[1] Petitioners cite **Fox et al** v. **34 Hillside Realty Co.**, 79 F. Supp. 832 (S.D. N.Y. 1948) and cases referred to therein in support of their proposition that joinder is not permissible under the Housing and Rent Act of 1947. These cases

larly in such a case as this where the petitioners themselves acknowledge that there are questions of fact and law common to all of the parties, arising out of the same series of transactions. They admit that the case involves the single issue of whether or not the building in which all plaintiffs reside was commonly known as a hotel and therefore decontrolled under the Rent Act. (Pet. 8), a question identical as to law and fact to all parties. The Court of Appeals for the Seventh Circuit has held that joinder of plaintiffs in damage suits under that Act is properly within the trial court's discretion. *Meyercheck* v. *Givens,* 180 F. (2d) 221 (C.A. 7, 1950).

Without further consideration of the propriety of the Trial Court's ruling on this question, it is clear that the refusal to dismiss this case for alleged improper joinder of parties does not warrant the extraordinary issuance of the writ of certiorari directly to the District Court. That Court's determination was clearly the exercise of a proper judicial function. It was in no sense an abuse of judicial discretion or the exercise of power beyond its jurisdiction—the situation to which the use of extraordinary writs is generally limited. *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21 (1943) and cases cited therein; *I.C.C.* v. *U. S.,* 289 U. S. 385, 393 (1933); *Ex Parte Peru,* 318 U. S. 578, (1943) and cases cited therein; *United States Alkali Export Ass'n.* v. *United States,* 325 U. S. 196, (1945); and *De Beers Consol. Mines* v. *United States,* 325 U. S. 212, (1945).

The decision of the Trial Court on this point may be questioned by petitioners upon appeal to the Court of

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(1 continued)
had nothing whatsoever to do with the propriety of joinder in one action under that Act, but are concerned only with whether the claims of the individual participants were cumulative in a suit for injunctive relief under the Housing and Rent Act of 1947, a point which is discussed subsequently in this brief.

Appeals. In no way has the District Court interfered with this right. *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21 (1943); *Ex Parte United States*, 287 U. S. 241 (1932); *Whitney* v. *Dick*, 202 U. S. 132, (1906). Nor do petitioners suffer any irreparable damage because of this ruling, as in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). True, petitioners must try the case on the merits before obtaining appellate review of the denial of their motion. This, however, has never been the basis for the issuance of a writ of certiorari. *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, 30-1 (1943). Nor is any matter of public importance involved, as required in *Ex Parte Peru*, 318 U. S. 578 (1943), and *United States Alkali Export Ass'n.* v. *United States*, 325 U. S. 196, (1945). The issuance of the writ under these circumstances to directly review an interlocutory ruling would subject to this extraordinary remedy every refusal by a trial court to dispose of a case without trial on the merits.

## II.

## THE CONSTRUCTION OF SECTION 205 OF THE HOUSING AND RENT ACT OF 1947 BY THE DISTRICT COURT, RESULTING IN DENIAL OF THE MOTION TO DISMISS, DOES NOT JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI TO THE DISTRICT COURT.

Petitioners moved to dismiss this case on the ground that none of the individual claimants asserted damages of $3,000.00. The Trial Court construed Section 205 of the Housing and Rent Act of 1947 as permitting such actions to be brought in the District Court without regard to the amount of damages sought, following *Adler et al.* v. *Northern Hotel Co.*, 175 F. 2d 619 (C.A. 7, 1949). Petitioners contend the denial of their motion to dismiss justifies the issuance of a writ of certiorari by this Court to the District Court because of a conflict between the

Seventh and Third Circuits (*Fields* v. *Washington*, 173 F. 2d 701 (C.A. 3, 1949)) on this point. Respondents contend that this is not a proper case for the use of an extraordinary writ for the following reasons:

1. The Trial Court's denial of the motion to dismiss may be brought before the Court of Appeals either under the ordinary appellate procedure or by request for the issuance of a writ of certiorari by that Court;

2. The construction of Section 205 of the Housing and Rent Act of 1947 and the denial of petitioners' motion was the exercise of a proper judicial function of the District Court and not the exercise of a power clearly beyond its jurisdiction—the situation to which this extraordinary remedy is generally limited;

3. There is no irreparable injury to the parties herein, such as is found in the cases cited by petitioners. Rather, there is only the "inconvenience" to the petitioners of trial on the merits, which has long been held not to be the basis for the extraordinary issuance of the writ of certiorari; and

4. This case does not involve a question of public importance analogous to those limited instances in which this Court has exercised the power to issue this writ extraordinarily.

We shall discuss each of these reasons as briefly as possible.

**The Trial Court's Action May Be Reviewed By The Court of Appeals.**

The District Court's denial of petitioners' motion to dismiss, by reason of its construction of Section 205 of the Housing and Rent Act of 1947, is a matter which may be brought before the Court of Appeals either under the usual appellate procedure or by request for certiorari under Section 1651 of the Judicial Code (28 U. S. C. A.

Section 1651). In nearly all cases in which this Court has issued writs of certiorari under Section 262 of the prior Judicial Code, the writ has issued to a Court of Appeals after a determination by that Court. Grants of certiorari by this Court did not involve, as it would in the present case, the use of the writ to review an interlocutory ruling of a trial court in circumvention of the appellate procedure established by Congress, unless the District Court's action in some way precluded access to the Court of Appeals.

As stated by this Court in *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, 26 (1943), in determining whether the writ should issue:

> "Considerations of importance to our answer here are * * * that no act or omission on its [the District Court] part has thwarted or tends to thwart appellate review of the ruling."

Both cases relied upon by petitioner support this conclusion. In *United States Alkali Export Association* v. *United States,* 325 U. S .196, 202 (1945), the Court stated:

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals whether by ordinary appeal (citing cases) or by an extraordinary remedy. (citing cases) But where, as here, sole appellate jurisdiction lies in this Court, application for a common-law writ in aid of appellate jurisdiction must be to this court."

In *De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945), it was emphasized that the action involved an equity suit brought by the Attorney General under the Sherman Anti-Trust Law where the Supreme Court had exclusive appellate jurisdiction.

There is no justification in this case for circumventing the Court of Appeals. Merely because that Court may have passed upon this question in other litigation does not permit petitioners' to assume that recourse to it will therefore be futile. In no case has this constituted the

basis for issuance of a writ of certiorari directly to a district court. More than this, petitioners have stated that this very question is now before the Court of Appeals for the Seventh Circuit in another of their cases where, after denial by the trial court of the motion to dismiss, judgment was entered against them and an appeal was taken (Pet. 3.)

This issue therefore may be considered promptly by that Court in the regular course of appeal. It would be a dangerous precedent to permit direct review by this Court of determinations of a trial court, before or after judgment, merely because the Court of Appeals for that Circuit may have passed upon the question in other litigation. Even under extraordinary circumstances which might warrant the issuance of the writ of certiorari, circumvention of the Court of Appeals has caused sharp dissent by members of this Court. *Ex Parte Peru,* 318 U.S. 578 (1943).

**The Trial Court's Denial of the Motion to Dismiss Was Not an "Extra-Judicial" Act.**

This Court has consistently held that it will not issue extraordinary writs as a substitute for appeal where the trial court has determined questions which it was competent to decide and which are reviewable in the regular course of appeal. This is true even where the determination of the trial court is on a question of jurisdiction. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26-27 (1943) and *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945). The ruling on petitioners' motion to dismiss involved solely a question of statutory construction. Certainly, the construction of a federal statute is a proper judicial function of a district court. This case is not analogous to *De Beers Consol. Mines* v. *United States,* 325 U. S. 212, 217, 220 (1945), where the Trial

Court had issued an injunction dealing "with a matter lying wholly outside the issue in the suit" and "beyond the power conferred upon the Court." Even there, however, four Justices dissented saying that (p. 225): "By that test, every interlocutory order which is wrong can be reviewed here * * * and the decision if followed will open the floodgates to review of interlocutory decrees." It cannot be contended that it was not within the province of the Trial Court to construe the federal statute involved. This case in no way involves a grasp of power beyond the jurisdiction of the Trial Court.

**Petitioners Suffer No Irreparable Injury As A Result of the Denial of Their Motion to Dismiss.**

In *De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945), the Court issued the writ because the temporary injunction involved was not appealable and the litigant would have suffered irreparable injury by having his assets completely tied up during the course of trial and regular appeal. Even there, four Justices dissented, saying that "hardship or inconvenience alone was not sufficient to justify resort to the extraordinary course of review by way of Section 262." No such unusual circumstance, however, is involved here. Petitioners claim that they should not be required to incur the expense of trial if they are correct in their contention that the Court lacked jurisdiction. Were this the basis for the extraordinary remedy sought, direct review could be had in every instance where a trial court has denied a motion to dismiss on any question where a contrary ruling would have terminated the litigation. Regular appellate procedure, if petitioners are correct, would become meaningless in those cases.

In *Whitney* v. *Dick,* 202 U. S. 132 (1906), this Court in reversing the Court of Appeals which had issued a

writ of certiorari for alleged lack of jurisdiction, stated that the reasons given by the Court of Appeals were similar to those frequently prompting writs of *habeas corpus*, namely: "to put an end to the litigation by some short summary process" rather than to proceed "in orderly way" by writ of error. This Court added that it had "repeatedly held against this procedure." Even if it were true—which it is not—that the litigation here would be long, involved and expensive, the inconvenience to the litigants of trial in advance of an appellate determination on the question of jurisdiction does not warrant the issuance of a writ of certiorari. As stated in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30-31 (1943):

> "We may assume, as they allege, that that trial may be of several months duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable * * * Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power or refusal to exercise it which it is the function of mandamus to correct."

**No Question of Grave Public Importance Requiring Extraordinary Issuance of the Writ of Certiorari Is Raised.**

Petitioners also contend that the conflict between the Seventh and Third Circuits as to the construction of Section 205 of the Housing and Rent Act of 1947 warrants the issuance by this Court of a writ of certiorari directly to the District Court. It is clear that the issuance of extraordinary writs is limited to extraordinary circumstances and is not to be applied to a case which "raises no question of grave public importance." Douglas, J., dissenting in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945).

In its most recent expressions concerning the issuance of extraordinary writs, this Court in denying such writs has said:

> "These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for really extraordinary cases." *Ex Parte Fahey,* 332 U. S. 258, 260 (1947), and *Ex Parte Collett,* 337 U. S. 55, 72 (1949).

In the former case the trial court had directed payment of $50,000.00 in fees and costs pending appeal. Nevertheless, the Court refused to issue the writ, saying:

> "We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the proper court rather than by resort to our original jurisdiction for extraordinary writs."

See also *Ex Parte Mars, Inc.,* 320 U. S. 710 (1943) and *Adams* v. *United States,* 317 U. S. 269, 274 (1943). The limited use of these writs was demonstrated by this Court in these words:

> "It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted." *Ex Parte Peru,* 318 U. S. 578, fn. 585 (1943).

It might be added that even in those instances where extraordinary circumstances or grave public importance required the issuance of the writ, it was a rare case in which there was not a vigorous dissent. Truly, the issuance of a writ of certiorari in advance of the regular appellate procedure, like all extraordinary writs, has been used only in extraordinary situations, for example: where the right of the litigant to appeal either to the Court of Appeals or to this Court from a state court has been

denied or precluded[2]; to review the issuance of the extraordinary writ of certiorari by a Court of Appeals;[3] where there has been a persistent disregard of the rules of civil procedure; where the Court refuses to perform a plain ministerial duty; where the case involves comity between state and federal courts; and where the petitioner has been deprived of his right of jury trial.[4] Similarly in cases of grave public importance, as in *Ex Parte Peru,* 318 U. S. 578 (1943), where the retention of a vessel belonging to the Republic of Peru, pending appeal from the District Court's denial of a claim of sovereign immunity, would "interfere with the proper conduct of our foreign relations" and cause a conflict between the Court and the Department of State which had certified the vessel as being immune. Even then there was a strong dissent. It has also been used where the denial of a preliminary motion by a district court would impair, retard or completely terminate the action of an administrative agency pending completion of the appeal (*United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945)), and where a temporary order would cause irreparable injury pending the completion of appeal (*De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945)).

That few opinions are found denying certiorari on questions of public importance is explained by the Court in *Ex Parte Peru,* 318 U. S. 578, fn. 585 (1943), where it was stated:

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[2] For example, see **Holiday** v. **Johnston,** 313 U. S. 342 (1941); **In Re: Chetwood,** 165 U. S. 443 (1897).

[3] **Whitney** v. **Dick,** 202 U. S. 132 (1906) reversing the Court of Appeals which had granted this extraordinary writ.

[4] The summary of cases indicating the limitation of the extraordinary writ to extraordinary circumstances is set out in **Roche** v. **Evaporated Milk Ass'n.,** 319 U. S. 21, 31-2 (1943).

> "Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance."

The issuance of the writ is the rare exception, for as stated in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943):

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

It is well established that the extraordinary writ will not be used as a substitute for appeal and that "there must be circumstances imperatively demanding a departure from the ordinary remedy by writ of error or appeal." *Whitney* v. *Dick*, 202 U. S. 132, 140, (1906).

How then does the instant case fit these concepts limiting the exercise of this extraordinary power? The construction of the statute by the District Court was the exercise of a proper judicial function and its conduct did not preclude recourse to the Court of Appeals. Review of the denial of the motion to dismiss is within the purview of the appellate court's jurisdiction. No justification exists for by-passing that court. The only "hardship" to the petitioners is the necessity of trying the case on its merits prior to appellate review of the denial of their motion.

Nor does the conflict between the Seventh and Third Circuits warrant the issuance of the writ to the District Court. Although conflict may, in this Court's discretion, be the basis for the issuance of a writ of certiorari to a court of appeals in the normal appellate process, we have been unable to find any case where conflict has been the basis for the extraordinary issuance of the writ directly to a district court or to a court of appeals prior to a determination by it.

There is even less reason to circumvent the ordinary appeal procedures by the issuance of the writ in this case since these very petitioners have the question of statutory construction pending before the Court of Appeals for the Seventh Circuit and a determination is presently available in the course of the regular appeal procedures (Pet. 3).

It is not denied that a conflict exists between the Seventh and Third Circuits as to the construction of Section 205 of the Housing and Rent Act of 1947 with respect to the requirement of $3,000.00 in controversy. This conflict, however, does not create the confusion extravagantly pictured by petitioners. There have been no decisions other than *Fields* v. *Washington,* 173 F. 2d 701 (C.A. 3, 1949), and *Adler et al* v. *Northern Hotel Co.,* 175 F. 2d 619 (C.A. 7, 1949), which have been decided by the Court of Appeals on the question.[5] During the period of more than one year since the conflict arose, petitioners cite only one decision by a district court in another circuit involving the same question, and we know of only one other. *Albright* v. *Wilson,* 87 F. Supp. 737, (D.C. Minn., 1949). Even before the conflict arose, there apparently were only three decisions by the district courts on this question.[6] Obvi-

[5] Petitioners assume and therefore state that the district courts of the 5th Circuit are compelled to dismiss damage suits under the Housing and Rent Act of 1947 because of **Steinfeldt** v. **Haymond,** 175 F. 2d 768 (C.A. 5, 1949), which petitioners allege is in accord with **Fields** v. **Washington** (Pet. 3, 12). The **Steinfeldt** case, decided prior to **Adler** v. **Northern Hotel Co.,** 175 F. 2d 619 (1949), did not involve this question, but concerned a treble damage suit under the Emergency Price Control Act of 1942 (56 Stat. 23, U.S.C. App., §§ 901-46, et seq.) which, all courts agree, granted jurisdiction without regard to amount. No tenant damages cases are cited which rely upon the **Steinfeldt** case as plaintiff would suggest.

[6] **Sampson** v. **Thomas,** 76 F. Supp. 691; **Adams** v. **Backlund,** 81 F. Supp. 643; **McCrae** v. **Johnson,** 84 F. Supp. 220. **United States** v. **Resch,** 79 F. Supp. 832 does not involve a private treble damage suit. Petitioners also cite **Fox** v. **34 Hillside Realty Corp.,** 79 F. Supp. 832 (S.D. N.Y. 1948); **Luftman** v.

ously, the effect of the conflict has not been such as to require the extraordinary intercession of this Court. Moreover, it cannot be disputed that in the year that this conflict has existed, many cases involving this question have been disposed of, and petitioners do not argue that in the year which has elapsed, the problem has become more acute by a flood of new cases. On the contrary, it will hardly be denied that the number of cases involving this question has been reduced during the year and in all probability will even be more greatly reduced and perhaps entirely eliminated. The question therefore arises: since no case other than petitioners', referred to in their petition, has reached a Court of Appeals subsequent to the conflict, why does this question suddenly require the need of the immediate and extraordinary relief which petitioners seek? More than this, petitioners' argument for the necessity of the quick resolution of the conflict is belied by the fact that they, themselves, have waited more than five months before taking any action to obtain a decision. Furthermore, in the case of *Henderson* v. *Belmar Building Corporation,* (N. D. Ill. No. 49 C 358), in which petitioners state that they are parties (Pet. 3), the file of the District Court shows that more than one year has passed since the

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(6 continued)
**Ross,** 75 F. Supp. 627 (S.D. N.Y., 1948); and **Spieler** v. **Haas,** 79 F. Supp. 835 (S.D. N.Y. 1948) as holding that the jurisdictional amount is indispensible (Pet. 13). These cases do not in any way involve damage suits under Section 205 of the Housing and Rent Act of 1947 or the question of jurisdiction involved herein. Rather, they were suits for injunction by tenants where no section of that Act gave jurisdiction. There has never been a conflict under this Act or its predecessor, the Emergency Price Control Act of 1942, as to the rule that this remedy was not available to tenants. **Hock** v. **250 Northern Ave. Corp.,** 142 F. 2d 435 (C.A. 2, 1944). Thus, none of these cases involved the proposition for which petitioners cite them, although by **dictum** each case stated that had they been damage suits by tenants under Section 205 of the 1947 Act, there would have been jurisdiction, regardless of the damages sought.

denial of petitioners' identical motion to dismiss, and no steps have been taken by them to seek review of that order. It is clear that petitioners selected the instant case in which to request this extraordinary relief rather than the *Henderson* case in order to conceal the staleness of their present request for emergency action.

Conflict cannot be the basis for the extraordinary exercise of the power to issue the writ even though the conflict relates to a question which might have disposed of the litigation without a trial. Under the Housing and Rent Act of 1947 and its predecessor statute, the Emergency Price Control Act of 1942, numerous conflicts arose between circuits even as to questions which would otherwise have disposed of the litigation of numerous lawsuits without trial.[7] The same is true under a myriad of federal statutes. Obviously, this Court would not exercise its extraordinary power to issue the writ directly to the district courts in all of those cases.

As heretofore stated, although conflict may be the reason, in the discretion of this Court, for the issuance of a writ of certiorari to a Court of Appeals after its final determination, it does not follow that conflict justifies emer-

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[7] For example, conflict arose after the termination of the Office of Price Administration as to whether the United States could be substituted for the Administrator as plaintiff in the many pending suits filed by that Agency, although the time for substitution had expired. The Eighth and Tenth Circuits so held. **Fleming** v. **Goodwin,** 165 F. 2d 334 (C.A. 8, 1948); **Northwestern Lumber and Shingle Co.** v. **United States,** 170 F. 2d 692 (C.A. 10, 1948). The Seventh Circuit held to the contrary. **Bowles** v. **Wilkie,** 175 F. 2d 35 (C.A. 7, 1949). Notwithstanding this conflict and notwithstanding the fact that courts in one circuit were dismissing such suits and in the other requiring that they be tried, this Court denied certiorari in the **Wilkie** case, 338 U. S. 861 (1950). In fact, prior to the conflict, this Court denied certiorari in the Eighth Circuit case although the ruling of that Court meant that if incorrect, many cases were being unnecessarily tried on the merits. **Goodwin** v. **United States,** 334 U. S. 828 (1948).

gency consideration by this Court by issuance of a writ of certiorari to the district court or to the Court of Appeals prior to determination by it. This is particularly true here where the conflict has existed for more than one year, the number of cases in which the question involved is diminishing, and the question is now presently pending before the Court of Appeals of the Seventh Circuit in accordance with the regular appellate procedure.

Petitioners argue that coupled with the conflict is the fact that trial could be avoided in the district courts in a number of cases if the trial court was wrong in denying the motion to dismiss. This, however, is true in every case where either plaintiff or defendant makes a motion which could dispose of the case without trial and the trial court overrules the motion. The number of such instances which arise in district courts either in individual cases or in instances where the court's ruling might dispose of a number of other cases, is countless. And the fact that the motion in the instant case involves the construction of a statute to determine whether the court has jurisdiction to hear damage suits regardless of the amount in controversy, is of no significance because the necessity of trying the case is equally avoided in all of the other instances. To accept petitioners' reasoning would "open the floodgates to a review of interlocutory decrees" and "circumvent the policy of Congress to restrict review of these cases to final judgment." Douglas, J., dissenting in *De Beers Consol. Mines* v. *U. S.*, 325 U. S. 212, 220 (1943).

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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